

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-909

ADOPTION OF QASIM
(and two companion cases¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The mother and the father appeal from decrees issued by a judge of the Juvenile Court terminating their parental rights to three of their children and dispensing with their rights to consent to the children's adoptions. We affirm.

Background. We begin with a brief summary of the facts, reserving other relevant facts for the discussion of the issues. The mother and the father have four children together. Their three youngest children are the subjects of this appeal. The mother and the father separated in 2012, and the father moved in with the paternal grandmother and paternal aunt, where the children would stay when visiting with the father. Even after their separation, the mother and the father did not get along and fought often. The Department of Children and Families (department) became involved with the family after receiving a

¹ Adoption of John and Adoption of Amy. The children's names are pseudonyms.

report pursuant to G. L. c. 119, § 51A (51A report), filed by a school guidance counsellor on behalf of John, alleging abuse by the mother. Additionally, Amy reported that her mother hit her with a belt and paddle, and stated that she preferred to live with her father. Amy also had difficulty in school, crying often, and urinating and defecating on the school's floor. Qasim complained that he did not want to go home. The police department also filed a 51A report with the department after receiving a 911 call in which yelling was heard over the phone. When the police responded to the home, they observed the children crying. The police learned that the mother had been fighting with her oldest daughter, Carol (a pseudonym).² During the fight, Carol told the mother to go "kill herself," and the mother responded by saying, "Maybe I will." The mother then held a large kitchen knife to her neck and locked herself in the bathroom.

Another 51A report was filed by hospital personnel alleging the sexual abuse of Amy by an older brother, David (a pseudonym).³ The department's investigation revealed that David sexually assaulted Amy on more than one occasion, including while visiting with the father in the paternal grandmother's

² Carol is not involved in this appeal.

³ David is not involved in this appeal.

home.⁴ The children were left alone with the paternal grandmother, despite the mother's request that the father supervise them during their visits. Upon learning of the abuse, the mother brought the children to the hospital. At her home, the mother rearranged the children's bedrooms so that David had his own room.

The department initiated a care and protection petition on behalf of the children. The children were permitted to remain in the mother's custody as long as she followed the requirements of a conditional custody order. For instance, all visitation with the father was to be supervised by a third party approved by the department. The mother's service plan also required that there be therapy for both the mother and the children; that the mother ensure that the children were not exposed to any verbal, physical, or sexual abuse; that no one else live in the home without the department's permission; that there be no contact between Amy and David;⁵ and that the mother maintain sobriety. The father's service plan contained similar requirements. After the mother and the father failed to progress with their service plans and violated the visitation requirements by travelling to Vermont together on a family vacation, the department obtained

⁴ The investigation revealed that David was sexually abused as a child by the paternal aunt. The father was also sexually abused as a child.

⁵ By this time David was no longer living in the home.

emergency custody of the children and placed them in foster homes. The parents were allowed to visit with the children, separately, and they consistently did so, coming prepared to the visits and behaving affectionately toward the children. Eventually, Qasim and John were removed from their after-school program after exhibiting aggressive behavior. They were subsequently placed in separate foster homes. Amy was removed from her initial foster home after having difficulties sleeping and acting aggressively or inappropriately toward the other children in the foster home.

After the department changed the permanency plans for the children to adoption, a fifteen-day trial regarding the termination of the mother's and father's parental rights took place over the course of six months. The judge found both the mother and the father unfit and terminated their parental rights, finding that adoption was in the each child's best interests. The judge ordered posttermination and postadoption contact between the parents and the children, as well as between each child and his or her siblings. This appeal followed.

Discussion. 1. Findings of unfitness. In the present matter, the father supports the return of the children to the mother. Both parents argue that there is no clear and convincing evidence supporting their unfitness. We disagree.

A decision to terminate parental rights calls for a two-part analysis. See G. L. c. 210, § 3; Adoption of Nancy, 443 Mass. 512, 515 (2005). The judge must find, by clear and convincing evidence, that the parent is unfit, and that termination is in the child's best interests. Adoption of Nancy, 443 Mass. at 514-515. When determining unfitness, "no one factor is determinative and the judge should weigh all the evidence" (footnote omitted). Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 290 (1987). "The judgment must analyze the parent's character, temperament, capacity and conduct in relation to the particular child's needs, age, affections and environment." Adoption of Carlos, 413 Mass. 339, 348 (1992).

We disagree with the mother's contention that the judge relied solely on past conduct in finding her unfit. "While a judge may rely upon a parent's prior pattern of behavior in determining parental unfitness, the judge is required to assess whether a parent is currently unfit." Adoption of Ramona, 61 Mass. App. Ct. 260, 264 (2004). The situation here, however, involved "prior patterns of ongoing, repeated, serious parental neglect, abuse, and misconduct" and could therefore be properly relied on in determining current unfitness. Adoption of Diane, 400 Mass. 196, 204 (1987). Further, "past parental conduct [is] relevant to the issue of current parental fitness where that

conduct was not too remote, especially where the evidence supported the continuing vitality of such conduct." Adoption of Larry, 434 Mass. 456, 469 (2001). The mother has a history of physically abusing the children and engaging in harmful behavior such as threatening to kill herself with a knife. Despite engaging in services required by the department, the mother still allowed the father to see the children unsupervised, and both parents were verbally abusive to one another in front of the children. The mother also failed to take full responsibility for her abusive behavior. Accordingly, the "judge was entitled to conclude that the mother's past actions, her failure to benefit from her service plan, and her continued commitment to the father indicated that she would be unable to protect her children from any future abuse." Adoption of Garret, 92 Mass. App. Ct. 664, 674 (2018).

The mother's abusive behavior toward Carol and David, her two older children, though not the subject of these termination proceedings, is also relevant, as "[i]t is well documented that witnessing domestic violence, as well as being one of its victims, has a profound impact on children." Custody of Vaughn, 422 Mass. 590, 599 (1996). See Adoption of Ramon, 41 Mass. App. Ct. 709, 716 (1996) (whether another member of family has been abused is factor for determining parent's fitness under G. L. c. 201, § 3). The fact that the mother abused all of her

children, and not just those subject to these adoption proceedings, further shows that the mother engaged in "a pattern of violence and verbally abusive behavior that affected the children adversely." Adoption of Zak, 87 Mass. App. Ct. 540, 543 (2015).

Next, both parents were unable to comply with the department's supervision and visitation rules. For example, the mother has a history of relationships with abusive men, and she allowed one of her physically abusive boyfriends to move into the home, despite the fact that he was not approved to do so by the department. The mother was also charged with crimes after the removal of the children, contrary to her service plan task requiring her to refrain from violating the law. The father argues that there is no link between these arrests and the mother's unfitness. Although a parent's criminal record is not conclusive, it bears on his or her fitness and may properly be considered. Care & Protection of Frank, 409 Mass. 492, 494-495 (1991). The criminal charges bear on the mother's fitness and ability to follow tasks in her service plan, and were properly considered by the judge.

As for the father's unfitness, he often visited the children unsupervised, in violation of the conditional custody order, and travelled to Vermont with the mother and children, also in contravention of the conditional custody order. The

father failed to provide the department with proof of his sobriety and did not engage in individual therapy, as required by his service plan. The father also failed to recognize how the children's sexual abuse negatively impacted them, and on occasion he had to be spoken to about his behavior with the children during his visits with them. Lastly, the father failed to provide a stable environment for the children. The children had to visit him at the paternal grandmother's home, which was unclean, and where they were not well-supervised and were exposed to arguments and physical fights between the father and other members of his family.⁶

We conclude that the judge carefully considered the factors set forth in G. L. c. 210, § 3, and properly determined that the mother and the father were unable to respond to or meet any of the children's specialized needs. There was clear and convincing evidence that the mother and the father are unfit to parent the three children.

2. Expert testimony. The parents also argue that the judge committed reversible error in finding the mother unfit because the judge failed to acknowledge the testimony of the mother's expert witness. The judge's amended findings explain in detail why her original findings were devoid of any reference

⁶ Some of these arguments included the topic of rape.

to the expert's testimony. The judge gave this evidence little, if any, weight due to the expert's limited interaction with the mother and the children, his inability to recall much of the information he obtained during his assessment, and his failure to fully complete the assessment. These findings are supported by the expert's testimony and are not clearly erroneous, as asserted by the parents. For instance, the mother takes issue with the judge's finding that the expert did not complete his assessment. However, the expert testified at trial that he had not written a report, had not finished certain evaluations, had not provided an assessment report, and still needed to conduct an exit interview with the mother. The mother also takes issue with the judge's finding that the expert could not remember specific tests that he administered, but on cross-examination, the expert specifically stated that he could not remember the specific tests he administered during the mother's initial interview.

As a result of these deficiencies, the judge did not consider the expert's testimony. Because the judge adequately reviewed the expert's testimony and explained why she did not credit it, the parents' argument is without merit.

3. Best interests of the children. "After ascertaining unfitness, the judge must determine whether the parent's unfitness is such that it would be in the child's best interests

to end all legal relations between parent and child." Adoption of Nancy, 443 Mass. at 515. The judge's findings must be left undisturbed unless they are "clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. 53, 59 (2011).

The mother claims that termination of her parental rights is not in the best interests of the subject children. She argues that the department presented "wholly undeveloped" adoption plans for Qasim and John and that the judge abused her discretion by accepting these plans. We conclude that the department's plans for Qasim and John were adequate. An adoption plan does not need to be "'fully developed' to be considered by the court." Adoption of Stuart, 39 Mass. App. Ct. 380, 393 (1995). It is enough that the plan "have content and substance enough to permit the court meaningfully to evaluate and consider . . . what [the department] proposes to do for the child by way of adoption." Id. See Adoption of Dora, 52 Mass. App. Ct. 472, 477 (2001). The "judge considering an adoption plan must make specific findings reflecting careful evaluation of the suitability of [the department's] proposal." Adoption of Lars, 46 Mass. App. Ct. 30, 31 (1998).

Here, the plan for Qasim was not fully developed due to his dangerous behaviors. For his safety, the department simply needed first to address and stabilize his behavioral issues

prior to placing him in a foster home. As for John, an adoption assessment was completed for him, and he was in a new specialized foster home as of February 2015. At the time of trial, the foster mother's adult son was considering becoming an adoption resource for John, although this possibility was at the very early stages of discussion. The department intended to pursue a traditional recruitment plan if this possible resource decided not to proceed. Accordingly, the judge was presented with sufficient substance in the plans for Qasim and John. Contrast Adoption of Stuart, supra (error to dispense with parental consent to adoption where there was no written adoption plan, no preadoptive homes had been identified, and social worker was "unable to testify as to what type of home would be suitable for each of the children").

We are also unpersuaded by the father's argument that the judge did not consider the best interests of each child individually. The judge's lengthy findings adequately address each child's specific needs and hardships, including each child's individual behavioral problems, educational progress and needs, and interviews with department social workers. The judge also considered each child's individual progress in their placements. For example, Amy appeared happier, shared more in therapy, and made positive adjustments to her new foster family, especially with regard to her preadoptive father and sisters.

This family also strongly advocated for more contact between Amy and John, her twin brother. Qasim was receiving help for his significant social, emotional, and behavioral issues and was placed in a smaller sized classroom, where he "picked up his academic subjects quickly." Lastly, John made positive adjustments in his current foster home and although he was experiencing some social problems, he was functioning well academically.

This is not a situation where the judge failed to "identify the child or children to whom the judge refers." Adoption of Ramona, 61 Mass. App. Ct. at 264. See Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 20 Mass. App. Ct. 689, 697-698 (1985). The judge's findings show that each child's situation was carefully considered. See Adoption of Nancy, 443 Mass. at 516 ("Although it would be better practice specifically to state the reasons that termination is in the child's best interest, such specificity is not required"). Based on all of the evidence, the judge's conclusions that termination would best serve the interests of the children constitute neither an abuse of discretion nor a clear error of law.

4. Delay in issuance of the findings. Finally, the parents' take issue with judge's delay in issuing her findings of fact and conclusions of law. The father argues that the

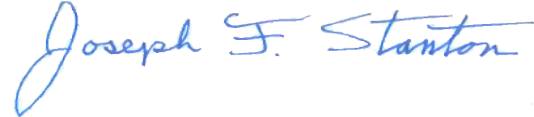
delay is prejudicial to the parents and a violation of due process. We disagree.

Here, the trial concluded on November 10, 2015. The termination decrees entered on June 29, 2016. The judge's findings of fact and conclusions of law were not issued until April 17, 2018. There is, however, no established "per se rule or presumption concerning the length of time after which the accuracy of a judge's findings may be called into question." Adoption of Rhona, 57 Mass. App. Ct. 479, 486 (2003). Where a judge's findings were issued two years after trial ended, this court has said that such lapse "strains the outer limits of any judge's ability to remember witness demeanor and credibility." Id. We note that although the delay here was unfortunate, it was not so great as to call the judge's memory of the witnesses' demeanor and other evidence into serious question. See Adoption of Luc, 94 Mass. App. Ct. 565, 571 (2018). All of the judge's factual findings are supported by the record. The parents rely on the judge's failure to include the mother's expert witness as evidence that the delay was prejudicial. However, as previously explained, the judge amended her findings and explained that such omission was due to the expert's lack of credibility. The father also failed to show how the delay caused any injury or changed the outcome of the case, as required for a due process claim. See Adoption of Don, 435 Mass. 158, 170 (2001) (no due

process claim where parents failed to show that delay was prejudicial). See also Commonwealth v. Pariseau, 466 Mass. 805, 810-812 (2014) (due process claim failed where defendant made no specific claim of prejudice). In conclusion, while the substantial time lapse between the conclusion of the trial and the judge's issuance of findings of fact and conclusions of law was inordinate, the parents have not shown that the outcome of this case would have been different had the issuance of the findings of fact and conclusions of law issued more expeditiously. Adoption of Don, supra.

Decrees affirmed.

By the Court (Meade,
Massing & Lemire, JJ.⁷),



Clerk

Entered: June 10, 2019.

⁷ The panelists are listed in order of seniority.